UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

7-14-82

Patricia Welsch, by her father and natural guardian, Richard Welsch, et al, on behalf of herself and all other persons similarly situated,	)	
Plaintiffs,	)	MEMORANDUM ORDER
vs.	)	No. 4-72-Civ. 451
Arthur E. Noot, et al,	)	
Defendants.	)	

****

The Consent Decree approved by this Court on September 15, 1980, has two major purposes: improvement of institutional conditions for mentally retarded State hospital residents and provision of community placements for some 800 of those residents. The success of the depopulation program depends on the availability of appropriate community day programs. The Decree was carefully designed to prevent the mere "dumping" of hospital residents in the community without adequate concern for their future welfare. The key anti-dumping provision of the Decree is found in paragraph 26:

> All persons discharged from state institutions shall be provided with appropriate educational, developmental or work programs, such as public school, developmental achievement programs, work activity, sheltered work, or competitive employment.

Under paragraph 22, an individualized plan is prepared to ensure that the requirements of paragraph 26 are met for each resident who is discharged.

Plaintiffs' motion to enforce paragraph 26 now before the Court raises the dual issues of what constitutes appropriate day programming and what is the obligation of the Commissioner of the Minnesota Department of Welfare to assure that this programming is provided. Although the motion arises in the context of a reduction in developmental achievement center (DAC) services to a single individual, the issues embraced by this motion are of importance to the class as a whole, especially in light of the potential for widespread future reductions in DAC services due to budget limitations.

Defendants respond to the motion for enforcement by arguing that the actions of the Commissioner are within the requirements of the Consent Decree, that the Court is without jurisdiction, that the Court should abstain from deciding the paragraph 26 issue until the Minnesota Supreme Court rules in the

case of Lindstrom v. State, No. 9273 (Minn. Dist. Ct., 9th Judicial Dist., Dec. 10, 1981), appeal filed sub nom., Swenson v. State, No. 82-34 (Minn. Jan. 11, 1982), and that this Court should certify controlling questions of State law to the Minnesota Supreme Court.

This Court has determined that, in order to comply with the Consent Decree and to promote its essential purposes, plaintiffs' motion for enforcement of paragraph 26 must be granted. Defendants' various procedural objections do not preclude the relief sought because all of these objections fail to recognize the significance of the Consent Decree that defendants have entered into.

I. Factual Background

The Court Monitor has already issued detailed findings of fact on this dispute. The following is intended as a brief introduction to the circumstances at issue.

Bruce L.[1] was born in St. Cloud, Minnesota, on July 28, 1941. The Stearns County Probate Court committed him as "feeble-minded" on March 26, 1946, and he was admitted to Faribault State Hospital on June 20, 1947. The next 34 years of his life were spent in the State hospital system. In 1963 he was transferred from the Faribault facility to Cambridge State Hospital, and in 1975 he was transferred to Brainerd State Hospital. The diagnosis of Bruce L. conducted at that institution included microcephaly, profound mental retardation, visual handicaps, major motor seizures, spasticity, and severe quadreplegia. He is non-ambulatory, but is able to propel himself slowly in a wheelchair. As required by paragraph 26 of the Consent Decree, a plan for his discharge from the State hospital system was prepared. This plan specified that Bruce L. would be discharged to the Ridgewood group home operated by Project Independence in Worthington, Minnesota, and that he would attend the Nobles County DAC on Mondays through Fridays for six hours per day.[2] Stearns County, as the county of financial responsibility, would pay for the cost of his DAC attendance.

On March 30, 1981, Bruce L. was provisionally discharged and the requirements of the discharge plan went into effect. Beginning on September 3, 1981, however, Stearns County announced a series of budgetary policies that had the effect of threatening a reduction in the number of days per week that Bruce L. would be able to attend the Nobles County DAC as well as possible demission of Bruce L. from both the Nobles County DAC and the Ridgewood group home.[3]

On May 11, 1982, the Court Monitor adopted the findings, conclusions, and recommendations of the hearing officer and recommended to the Court that:

> The DAC programming for Bruce L. should not be decreased from five to three days per week but rather should be maintained at a five day level until such time as Bruce's interdisciplinary team determines that a modification of his DAC programming is necessitated and justified on the basis of individual need. Paragraph 26 Hearing Supplemental Findings of Fact and Recommendations at 5 (May 11, 1982).

Pursuant to paragraph 95(h) of the Consent Decree, plaintiffs moved for enforcement, and a hearing was held by the Court on May 26, 1982.

As matters stood on that date, plaintiffs alleged that Bruce L. could only be assured for funding for two or three days per week of DAC programming.[4] Plaintiffs calculated that an additional $1,409 would be necessary to provide full DAC services for the rest of 1982. Although the Nobles County DAC would no longer demit Bruce L. for lack of full week funding,[5] plaintiffs alleged that he might lose his residential placement at Ridgewood group home because the staffing of that facility assumes that residents will normally attend DAC five days per week.[6]

II. The Requirements of Paragraph 26

The Court Monitor found that the word "appropriate" in paragraph 26 "envisions an individualized determination of the services to be provided to each discharged person." Paragraph 26 Hearing Findings of Fact and Recommendations at 20 (April 7, 1982). The propriety of this interpretation is established by reference to a number of allied provisions of the Decree. Paragraph 21 requires an annual individual assessment of the needs each resident will have for community services after discharge. The focus of this assessment is to be on the needs of the resident rather than the services that may already be available. Paragraph 22 requires the preparation of an individualized discharge plan which is to specify the developmental programs that will be made available to each discharged class member. After discharge into the community, the county social worker is required to visit the class member, both to ascertain that he or she is receiving the services required by the discharge plan and to review the "appropriateness" of the placement. Paragraph 24 provides that "[p]ersons discharged from state institutions shall be placed in community programs which appropriately meet their individual needs." In sum, the Decree contemplates a system of individually designed and executed community programs.

The Court Monitor found and the Court concurs that "[i]n determining the appropriate level of DAC services the first consideration should be the discharge plan." Paragraph 26 Hearing Findings of Fact and Recommendations at 21 (April 7, 1982). This conclusion is justified because the discharge plan is the product of the persons who have the most knowledge of the resident's

individual needs. Deviations from this plan are permissible, but the changes must be made on the basis of the individualized needs of the class member.[7]

The Commissioner of Public Welfare is responsible for assuring that each class member receives appropriate paragraph 26 services. Paragraph 26 does not specify any responsible person or entity, but the duty of the Commissioner is evident from paragraph 1 of the Consent Decree:

> Unless otherwise specified, the actions required by this Decree are the joint responsibility of the defendant Commissioner of Public Welfare and the defendant Chief Executive Officers of Brainerd State Hospital, Cambridge State Hospital, Faribault State Hospital , Fergus Falls State Hospital, Moose Lake State Hospital, Rochester State Hospital, St. Peter State Hospital, and Willmar State Hospital, their successors in office, agents, employees and all persons in active concert or participation with them.

The Court must construe the Consent Decree "as it is written," United States v. ITT Continental Baking Co., 420 U.S. 223, 236 (1975) (citing United States v. Armour & Co., 402 U.S. 673, 681-82 (1971)), and there is good reason to place the ultimate burden for the actions in paragraph 26 on the Commissioner. If the specter of dumping is to be avoided, it is vitally important that the requirements of paragraph 26 be realized, and this cannot be left to the uncertainties of the policymaking processes in Minnesota's 87 counties.

Defendants respond that the Decree incorporates State law on the allocation of duties between the Commissioner and the counties and therefore that responsibility for determining the level of DAC services Bruce L. will receive rests with Stearns County, not the Commissioner. Defendants draw upon the Community Social Services Act (CSSA), Minn. Laws 1979, ch. 324 §§ 1-12 (codified as amended at Minn. Stat. Ann. §§ 256E.01-.12 (West 1982)), which had as its purpose the transformation of community social service programs in Minnesota into a county administered, State supervised system. See Minn. Stat. Ann. § 256E.02 (West 1982). Under the CSSA, the counties are responsible for planning and funding community social services, see Minn. Stat. Ann. § 256E.08 (West 1982), while the Commissioner sets general standards and reviews the activities of the counties. See Minn. Stat. Ann. § 256E.05 (West 1982). The CSSA was enacted in 1979, and defendants maintain that the Decree, approved by this Court in 1980, was designed to incorporate the new State legislation. Defendants cite a number of paragraphs of the Decree which either reflect the structure of the CSSA as a county administered, State supervised system for the provision of community social service programs or else explicitly allocate responsibilities to the counties.[8] Defendants also refer to initial drafts of the Decree to show that, while the plaintiffs originally sought to make the Commissioner

responsible for the planning and provision of community services, defendants prevailed in their view that the Decree should be consistent with the structure of the CSSA.[9] Defendants acknowledge that paragraph 26 is silent on the allocation of responsibility, but they argue that this paragraph is merely a statement of the general requirements for community day programs. Defendants conclude:

> A review of all those portions of the Consent Decree pertaining to community placements and a review of the position papers and drafts preceding the Consent Decree, leads to the inescapable conclusion that the Consent Decree adopts the relationship established by existing state law between the counties and the defendant commissioner.
>
> Therefore, the responsibility for determining whether Bruce will receive three or five days of DAC per week falls upon the counties, and not the Commissioner. That decision is one, "otherwise specified" as the responsibility of someone other than the Commissioner. Consent Decree, paragraph 1. As long as Stearns County is complying with state law and the Commissioner's supervisory policy directives, there is no basis for this Court to find non-compliance. Defendants' Responsive Memorandum - Paragraph 26 Compliance at 37.

Defendants' theory requires a logical step that this Court is unwilling to take. Even if the Consent Decree limited the Commissioner to his statutory role within the structure of the CSSA as a county administered, State supervised system for the provision of community social services, this would not mean that he would be without responsibility under paragraph 26. The Commissioner would still have to be guided by paragraph 26 in his role as the coordinating policy-maker for the CSSA. But the Court finds that the obligation of the Commissioner under paragraph 26 goes further than the role envisioned for him by the State legislature when it enacted the CSSA. Paragraph 1 of the Consent Decree accords the Commissioner responsibility for the actions specified in paragraph 26, and it is highly significant that the relevant substance of paragraphs 1 and 26 remained unchanged throughout the negotiation process leading up to adoption of the final language of the Consent Decree. The Court agrees with plaintiffs that the provisions of the Consent Decree cited by defendants which reflect the structure of the CSSA do not detract from the Commissioner's clear responsibility under paragraphs 1 and 26. Plaintiffs may have acquiesced in defendants' demands that the Consent Decree follow the CSSA and involve the counties in the planning and provision of community services for class members, but this did not remove from the Commissioner ultimate responsibility for assuring that these services are provided. The Commissioner must proceed with vigor and diligence to do everything he can to assure the provision of appropriate day programming to discharged hospital residents.[10]

This Court now turns to the questions of whether Bruce L. is receiving the services he is entitled to under paragraph 26 and if the Commissioner has

lived up to the responsibilities imposed upon him by the Decree.

III. The Case of Bruce L.

A. Appropriateness of Reduction in DAC Services

The actions of Stearns County threaten Bruce L. with a reduction in the DAC services specified in his individualized discharge plan, and this reduction is not based on Bruce L.'s individual needs. Further, the Court Monitor found that the evidence submitted by plaintiffs supported the continuation of five days of DAC service per week for Bruce L. The Nobles County social worker assigned to Bruce L. stated that full time DAC services are necessary if Bruce L. is to retain the skills he has learned since his discharge from the State hospital system and if he is to continue his developmental growth. The Nobles County DAC director said that it is important for Bruce L. to be placed in a situation where he is required to interact with other people and that a reduction in DAC attendance for Bruce L. would result in a regress in his socialization skills. The DAC director also stated that Bruce L. must participate in the DAC program without interruption if he is to continue progress toward the realization of his potential. The director of Ridgewood group home found that Bruce L.'s progress requires full time DAC attendance. The Court concurs with the Court Monitor that a reduction in services to Bruce L. would be inappropriate under paragraph 26 of the Consent Decree.

Defendants did not submit any evidence to show that three days per week would be more appropriate than five in Bruce L.'s individual case. Defendants stated that they did not wish to argue for the appropriateness of three over five; they viewed the reduction as an unfortunate consequence of budgetary limitations rather than an action that is justified from the standpoint of treatment. They maintained that a return to full programming should be expected in the future when the Stearns County budget is more healthy.

Defendants' posture glosses over the true issues in this dispute. The first issue is whether the reduction in service is appropriate under paragraph 26. The terms of the discharge plan as well as the evidence submitted by plaintiffs demonstrate that the reduction does not meet the criterion of appropriateness. Defendants' unwillingness to address this issue does not alter the situation. The second issue is whether the Commissioner has fulfilled his duty under paragraph 26 to assure the provision of appropriate DAC services for Bruce L. As suggested above, this responsibility is not satisfied by mere acquiescence in the actions of the counties.

B. Actions of the Commissioner

Defendants place much emphasis upon the case of Lindstrom v. State, No. 9273 (Minn. Dist. Ct., 9th Judicial Dist., Dec. 10, 1981), appeal filed sub nom., Swenson v. State, No. 82-34 (Minn. Jan. 11, 1982). This case involved a decision by Kittson County to limit the amount of DAC services for mentally retarded Kittson County residents being hosted by other counties to three days per week. The DAC recipients--none of whom are class members in the present action discharged from the State hospital system after September 15, 1980--filed appeals under Minn. Stat. Ann. § 256.045(3) (West 1982). The referee reversed the decision of the county agency, drawing upon the language of Department of Public Welfare Rule 160 that makes provision of DAC services mandatory. The Commissioner amended the conclusions of the referee, interpreting Rule 160 to allow a county to limit DAC services in the face of a serious budget deficit. A three judge State district court panel affirmed the Commissioner, holding the Commissioner's interpretation of the Department of Public Welfare rules at issue was not clearly erroneous and was, in fact, required by the Minnesota DAC statutes. In particular, the court drew upon a provision that allows county boards to make grants for the establishment of DAC centers "within the limits of money appropriated," Minn. Stat. Ann. § 252.21 (West 1982), and a provision that requires county boards to provide DAC services "within the appropriation made available for this purpose." Minn. Stat. Ann. § 252.24 (West 1982).[11] Review of this decision is now pending before the Minnesota Supreme Court.

Defendants cite Lindstrom to show that State law allows a county to reduce DAC services from five to three days per week. On the assumption that the Minnesota Supreme Court will affirm the State district court, this proposition will be conclusively established. Defendants argue that Stearns County's reduction in services to Bruce L. is not grounds for finding the Commissioner in violation of paragraph 26 because they maintain that the Consent Decree incorporates State law as interpreted by Lindstrom on the division of responsibilities between the counties and the Commissioner. Further, defendants argue that the Commissioner is fulfilling his responsibility under State law to supervise the counties as they adjust their funding of DAC services to financial constraints. On April 30, 1981, the Commissioner issued Instructional Bulletin #81-35 (Court Monitor Hearing, Ex. 8 (Feb. 5, 1982)). This document was addressed to the counties and stated that, although DAC services are mandatory, a county may reduce the number of days of service in the face of documented

budgetary limitations. Since the issuance of Instructional Bulletin #81-35, the Commissioner has promulgated additional guidelines on the reduction of DAC services. Through his decisions on appeals by recipients of county services, the Commissioner has begun to develop a series of precedents to guide the counties. The administrative decision by the Commissioner in Lindstrom is an example of this kind of action. In another case, the Commissioner affirmed the referee's reversal of a Beltrami County decision to terminate all DAC services for persons over sixty-two years of age. Court Monitor Hearing, Ex. 10 (Feb. 5, 1982). The Commissioner maintained that counties may impose categorical limitations on services but not categorical exclusions. In other rulings the Commissioner has followed the pattern of approving reductions in DAC services for legitimate financial reasons but of disallowing complete terminations in service. Finally, the Commissioner has prepared a policy statement that prevents DACs from terminating service to clients whose funding has been reduced to allow only three days of attendance per week. Minnesota Department of Public Welfare, The Responsibilities of D.A.C. Boards in Admission/Discharge of Participants Eligible for Services Under Minnesota Statutes 252.23 (May 4, 1982) (Court Monitor Hearing, Ex. 34 (Feb. 5, 1982)). This policy led the Nobles County DAC to reverse its earlier position that Bruce L. would be demitted for lack of full week funding. Defendants rest by asserting:

> The Commissioner is fulfilling his supervisory role by issuing appropriate bulletins and establishing policy in his appeals decisions. As indicated in Lindstrom, this appears to be the role envisioned by the State Legislature and deemed reasonable by the State court. Defendants' Responsive Memorandum--Paragraph 26 Compliance at 42.

The Court is unwilling to adopt this view because it ignores the significance of paragraph 26 of the Consent Decree. Paragraph 26 places the Commissioner under an obligation to assure the provision of appropriate day programming. The mere fact that the Commissioner has exercised some of his supervisory authority does not mean that his actions satisfy the Consent Decree. The Commissioner must do everything he can to assure compliance with paragraph 26. Although the Commissioner's current regulations, policy guidelines, and interpretations may allow counties to reduce the number of days of DAC service that retarded citizens receive, it may be that it is within the power of the Commissioner to promulgate other regulations, policy guidelines, and interpretations that would assure appropriate DAC services for Bruce L. and other members of the plaintiff class. Lindstrom does not reach this issue. Rather than demonstrating that he has exhausted all options, the actions taken by the

Commissioner to date that are discussed in the preceding paragraph of this Memorandum Order show that the Commissioner has significant authority to direct the evolution of policy on DAC services. Further, plaintiffs cite a group of statutory provisions which they say would allow the Commissioner to assure the provision of DAC service for Bruce L.[12] Defendants respond by attempting to refute the significance that plaintiffs attach to each of these statutes. The Court will not reproduce these discussions of State law here; suffice it to say that the positions of the parties on the residual powers of the Commissioner remain undeveloped and inconclusive. Beyond the issue of the express statutory authority of the Commissioner, there is the question of what other actions he might take. The Court would note, for example, that in their focus on Lindstrom, defendants have avoided the question of alternative funding mechanisms for DAC services and the potential of these alternatives for assuring the provision of services to Bruce L. The issue of alternative financing was raised in the hearings that led to this Court's Memorandum Order of January 13, 1982, on paragraph 89 compliance. The Court is simply unwilling to accept defendants' conclusion on the basis of the arguments which have been presented thus far that the Commissioner has done everything he can to assure Bruce L. of the DAC services he is entitled to under the Consent Decree. A much stronger showing is necessary before the Court will find the Commissioner in compliance with paragraph 26.

Accordingly, the Court's Order shall incorporate the following directive to the Commissioner:

> The defendant Commissioner of Public Welfare, his successors in office, and all persons in active concert or participation with him, shall forthwith take whatever action or actions may be necessary to assure that Bruce L. is provided developmental achievement center services at the Nobles County DAC on a full day, full time basis until such time as a modification of his DAC programming is made in accordance with the provisions of the Consent Decree on the basis that such modification is necessitated and justified to meet his individual need.[13]

The Court has purposely left this directive open-ended to allow the Commissioner to choose the method of assuring compliance that he finds most favorable.

Defendants argue that one effect of granting plaintiffs' motion for enforcement in the case of Bruce L. would be to impose reductions in vitally needed social services for other persons. If the Commissioner orders Stearns County to provide additional funds, defendants maintain that the money would have to come from other county social service programs because the Stearns County social service fund is showing a serious deficit. Defendants point out

that Stearns County has already significantly reduced social service programs.

The Court views the possibility of reductions in social services to other recipients as a highly unfortunate result, but the rights of the plaintiffs in this case under the Consent Decree cannot be ignored in the face of budget limitations. The duty of this Court is to vindicate legal rights, and Bruce L. should not be treated differently from any other person who has a valid claim against the government. As this Court said in its Memorandum Order of March 23, 1982:

> Defendants suggest that the current financial climate has made it impossible for them to strictly comply, but to allow the defendants to unilaterally change the Decree or to ignore certain provisions when compliance becomes difficult would render the agreement meaningless. Slip. op. at 5.

The Court continues to be guided by the principle that the Consent Decree imposes binding obligations that cannot be shrugged off by noncompliance. See Delaware Valley Citizens' Council for Clean Air v. Pennsylvania, 674 F.2d 976, 984 (3rd Cir. 1982)("it is obvious that a party to a binding judgment cannot comply with its terms by ignoring strictures placed upon it in the hope that they will disappear").

IV. Jurisdiction, Abstention, and Certification

Now that the Court has analyzed the substantive issues in this dispute, defendants' "procedural" objections can be readily dismissed.

A. Jurisdiction

Defendants argue that any objection Bruce L. has to the reduction in DAC services should be raised through the State administrative appeals process and not before this Court. Defendants' argument here rests once again on their theory that the Consent Decree incorporates State law, and they argue that the proper way for Bruce L. to appeal a reduction is under Minn. Stat. Ann. §256.045 (West 1982). In further support of this contention, defendants point to paragraph 27 of the Consent Decree. This paragraph says:

> A state hospital resident or the resident's parent or guardian may object to a proposed community placement by appealing the placement decision pursuant to Department of Public Welfare Rule 185, which provides appeal procedures under Minn. Stat. § 256.045, social service appeal.

Defendants urge this Court to dismiss the present motion for lack of jurisdiction.

Once again, defendants have failed to pay proper credence to the Consent Decree as an independent source of legal obligations for the Commissioner. Paragraph 95 clearly endows the Court Monitor and the Court with jurisdiction to consider questions of compliance with the Consent Decree:

> When approved by the Court, the monitor shall be appointed to perform the following functions in his or her professtional capacity as a neutral officer of the Court:
>
> a. The monitor shall review the extent to which the defendants have complied with this Decree.
>
> * * *
>
> d. The monitor shall receive and investigate reports of alleged non-compliance with the provisions of this Decree from counsel for the plaintiffs and from other interested persons . . . .
>
> * * *
>
> g. If either the monitor or either party is dissatisfied with the result of the formal conference held in accordance with subparagraph (f), above, the monitor shall conduct, or retain a qualified hearing officer to conduct, an evidentiary hearing regarding the question of compliance raised by the notice provided defendants pursuant to subparagraph (e) above . . . .
>
> * * *
>
> h. Recommendations made by the monitor shall not be implemented except on motion by either of the parties or by the Court, after notice and an opportunity for all parties to be heard by the Court. [14]

Plaintiffs point out that the Court Monitor and the Court must have jurisdiction to review compliance if the Decree is to have its intended effect. This was the very reason for the creation of the position of Court Monitor. The State administrative appeals procedure found in section 256.045 is clearly inadequate for monitoring compliance by the Commissioner because the Commissioner himself has the final administrative voice, Minn. Stat. Ann. § 256.045(5) (West 1982), and the only avenue of further appeal is through the Minnesota state courts. Minn. Stat. Ann. § 256.045(7) (West 1982). The Court Monitor found, and the Court concurs, that paragraph 27, insofar as it invokes section 256.045, only comes into play when a resident objects to a proposed placement. By contrast, the present proceeding is concerned with the issue of compliance with a discharge plan that has been agreed to by all concerned.

B. Abstention

Defendants argue that this Court should abstain pending Minnesota Supreme Court review of Lindstrom v. State, No. 9273 (Minn. Dist. Ct., 9th Judicial Dist., Dec. 10, 1981), appeal filed sub nom., Swenson v. State, No. 82-34 (Minn. Jan. 11, 1982). As grounds for their position, defendants argue that the identical issue of whether a retarded citizen's DAC can be reduced to three days is posed in both proceedings. Defendants cite Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941), Younger v. Harris, 401 U.S. 37 (1971), and numerous Federal court decisions decided under these two cases as authority for abstaining. Succinctly stated, Pullman requires that "when a federal constitutional

claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state-law question and thus avoid the possibility of unnecessarily deciding a constitutional question." Harris County Comm'rs Court v. Moore, 420 U.S. 77, 83 (1975). The essence of Younger is that "a federal court should not enjoin a state criminal prosecution begun prior to the institution of the federal suit except in very unusual situations, where necessary to prevent immediate irreparable injury." Samuels v. Mackell, 401 U.S. 66, 69 (1971). A number of cases have extended the Younger doctrine into the quasi-criminal and civil sphere. See, e.g., Trainor v. Hernandez, 431 U.S. 434 (1977); Judice v. Vail, 430 U.S. 327 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

It is immediately apparent that the Pullman and Younger lines of authority are inapplicable here. Lindstrom is a challenge under State law to the Commissioner's interpretation of a State regulation, while the present motion for enforcement is concerned with the Commissioner's obligations under paragraph 26 of the Consent Decree. The Court does not even reach any conclusions on the State law issues that are being litigated in Lindstrom. Moreover, the Court has not found a State law unconstitutional and the Court is not proposing in this Memorandum Order to enjoin an ongoing State proceeding or the enforcement of a State law. Defendants' argument for abstention must be rejected.

C. Certification

Pursuant to Minn. Stat. Ann. § 480.061 (West Supp. 1982), defendants have moved to certify the following legal issue to the Minnesota Supreme Court: "whether, under Minnesota law, a Minnesota county may reduce DAC services for a mentally retarded person from five days a week to three days a week." Defendants argue that although this question is before the Minnesota Supreme Court in Lindstrom, certification of the question may hasten a decision in that case.

Once again, defendants err in asserting that a decision in Lindstrom will control the present motion which is concerned with the Commissioner's obligations under paragraph 26 of the Consent Decree.[15] Certification of the question posed by defendants is not warranted.

V. Conclusion

Paragraph 26 of the Consent Decree was formulated to prevent the dumping of State hospital residents in the community without attention to their continuing individual needs. The appropriate community services for each discharged

resident are specified in his or her discharge plan, and any deviation from this plan can only be made for reasons of the individual needs of the class member. The structure of paragraphs 1 and 26 of the Consent Decree as well as the other relevant provisions demonstrate that the Commissioner is responsible for assuring that appropriate community services are provided to each discharged resident. In the present case, the threatened reduction in DAC services for Bruce L. would be a violation of paragraph 26 of the Consent Decree. Although the Commissioner maintains that he has done everything he can to assure provision of services to Bruce L., the Court remains unconvinced at this time.

IT IS ORDERED THAT:

1. The defendant Commissioner of Public Welfare, his successors in office, and all persons in active concert or participation with him, shall forthwith take whatever action or actions may be necessary to assure that Bruce L. is provided developmental achievement center services at the Nobles County DAC on a full day, full time basis until such time as a modification of his DAC programming is made in accordance with the provisions of the Consent Decree on the basis that such modification is necessitated and justified to meet his individual need.

2. Defendants' motion for certification of legal issues to the Minnesota Supreme Court is denied.

Judgment will be entered as ordered.

July 14, 1982.

/s/ Earl R. Larson
United States Senior District Judge

FOOTNOTES

1. The class member is referred to by first name and last initial in order to preserve his privacy and the confidentiality of his records.

2. The discharge plan provided that, until the new Nobles County DAC building was completed, Bruce L. would receive developmental programming through the Nobles County DAC at the Ridgewood home. Bruce L. started attending the DAC program in the new building soon after January 1, 1982.

3. The Court Monitor details an extensive sequence of events between the time of the September 3, 1981, letter and the Court Monitor's report. See Paragraph 26 Hearing Findings of Fact and Recommendations at 6-9 (April 7, 1982).

4. Defendants suggested that Bruce L. did not face any immediate reduction in services. They maintained that during the remainder of June the Ridgewood group home would have two interns who could assist in day programming. They argued further that there would be no difficulty during the month of July because the Nobles County DAC is closed for summer recess and the group home has additional staff for day programs. Contrary to plaintiffs' position that Bruce L. faced a reduction to two or three days per week, defendants seemed to anticipate an ultimate reduction to three days per week.

5. This is in accordance with a policy recently enacted by the Commissioner. See Minnesota Department of Public Welfare, The Responsibilities of D.A.C. Boards in Admission/Discharge of Participants Eligible for Services under Minnesota Statutes 252.23 (May 4, 1982)(Court Monitor Hearing, Ex. 34 (Feb. 5, 1982)).

6. Plaintiffs suggested that demission from Ridgewood might lead to the return of Bruce L. to Brainerd State Hospital. Defendants denied that this would result.

7. The Court Monitor allocated the burdens of proof on plaintiffs and defendants as follows:

> In a case such as this one where the care and services provided to an individual are in issue, the initial burden rests with the plaintiff to show first that there has been a change in the scope and level of services specified in the discharge plan and the subsequent plans adopted by interdisciplinary teams regarding the individual, and second that such change in the services was made for reasons other than an assessment of the individual's needs . . . . Once the plaintiff has acquired such information and challenged such modification meeting the burdens set forth above, the defendant must insure that the county responsible for community placement is using all available funding apropriated for purposes of providing DAC services and that the individual class member is continuing to receive DAC services which are "appropriate" as mandated by paragraph 26 of the Consent Decree. Paragraph 26 Hearing Findings of Fact and Recommendations at 21-22 (April 7, 1982).

8. Defendants cite paragraphs 16 - 22, 27 - 33. There are several provisions that defendants place special emphasis upon. Paragraph 16 states:

> Mentally retarded persons shall be admitted to state institutions only when no appropriate community placement is available. The county has responsibility for locating an appropriate community placement, or, in the event that none exists, insuring that such placement is developed. In accordance with whatever authority is granted by statute and rule the Commissioner shall assure that counties perform their duties with respect to community placements.

Defendants argue that this provision clearly reflects the structure of the CSSA and that it limits the responsibility of the Commissioner to his authority under State law to supervise and set standards. Paragraph 22 provides:

Footnote 8, continued.

> The parties acknowledge that Minnesota law places the responsibility for establishing a continuing plan of after-care services upon the counties. Accordingly, prior to a resident's discharge from an institution, the county social worker, in cooperation with the resident, the parents or guardian, community service providers, and the interdisciplinary team shall formulate a discharge plan . . . .

Defendants find this provision is notable for its express reference to the role of the counties under the CSSA and for its allocation of responsibility to the county social worker. Paragraph 27 says:

> A state hospital resident or the resident's parent or guardian may object to a proposed community placement by appealing the placement decision pursuant to Department of Public Welfare Rule 185, which provides appeal procedures under Minn. Stat. § 256.045, social service appeal.

Defendants point out that paragraph 27 directly incorporates a State statutory mechanism for residents to appeal community placement decisions.

9. Defendants show that plaintiffs originally sought to stop all State hospital admissions under paragraph 16 or, at least, to make the Commissioner responsible for locating community placements. Plaintiffs' original proposal for paregraph 21 did not say that the county would use the annual assessment along with the Commissioner in planning community services. As first drafted by plaintiffs, paragraph 22 did not contain the ultimately adopted language which acknowledges "that Minnesota law places the responsibility for establishing a continuing plan of after-care services upon the counties." Also, the original version of paragraph 22 did not include the finally agreed upon role for the county social worker in the preparation of the discharge plan and the post-placement assessment.

10. This pattern is reflected in paragraph 23 of the Consent Decree which provides that if the county social worker does not submit the required paragraph 22(e) post-placement assessment, "[t]hen the Commissioner shall assure that such an assessment is conducted."

11. The Court also drew upon Department of Public Welfare Rule 185.

12. Plaintiffs cite Minn. Stat. Ann. §§ 256.045(6), 256E.05(1), 256E.05(2), 256E.05(3)(b) (West 1982). Plaintiffs' Memorandum in Support of Motion for Order Enforcing Compliance with Paragraph 26 at 35-36.

13. In their motion for enforcement plaintiffs follow the recommendation of the Court Monitor and move for an order requiring that full time DAC should continue "until such time as a modification of his DAC programming is made by his interdisciplinary team on the basis that such modification is necessitated and justified to meet his individual need." Defendants object that, under paragraph 22 of the Consent Decree, responsibility for the discharge plan falls first on the county social worker assigned to Bruce L. Without stating an opinion on the merits of this dispute, the Court finds that the issue of modification of a discharge plan has not been adequately briefed. Accordingly, the Court has modified the proposed form of order as indicated in the text accompanying this note.

14. This Court has retained jurisdiction under paragraph 111 of the Consent Decree.

15. The State district court in Lindstrom recognized the difference between the State law issues it was deciding and the question of compliance with the Consent Decree:

> We are not so sure that "possible violation of the Welsch deinstitutionalization requirement due to DAC service reductions remains speculative at best" as contended in the State's brief. However, the potential problem remains that of the Commissioner of Public Welfare and the U.S. District Court. Slip op. at 9.